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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 770

ROBERT LYNN MARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was found guilty of transmitting wagers and wagering information from Houston, Texas, to Las Vegas, Nevada, in violation of 18 U.S.C. 1084 (Tr. 176). On May 26, 1966, he was sentenced to a suspended term of two years' imprisonment and fined $10,000. Notice of appeal was filed in the United States Court of Appeals for the Fifth Circuit on June 30, 1966,

and the case docketed there on September 19, 1966. On November 14, 1966, prior to judgment in the court of appeals, the petitioner filed a petition for a writ of certiorari in this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

At trial, counsel for petitioner and the government entered a stipulation whereby petitioner admitted all the facts alleged in the indictment (thus, in effect, pleading guilty), while reserving his objection to the constitutionality of 18 U.S.C. 1084 (Tr. 171-172). He seeks certiorari before judgment in the court of appeals on the contention that that statute infringes the Tenth Amendment of the United States Constitution (Pet. 5).

There is no reason to grant petitioner the extraordinary review which he seeks here. Rule 20 of the Rules of this Court states:

> A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. * * *

The present case is not of such imperative public importance as to warrant review under this Rule. Compare *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579; *United States* v. *United Mine Workers*, 330 U.S. 258; *Carter* v. *Carter Coal Co.*, 298 U.S. 238. Petitioner argues that *United States* v. *Fabrizio*, No. 47, this term (decided December 12, 1966), presents

the same question as does the present case and urges the Court to decide this case with *Fabrizio* (Pet. 2). Even if petitioner's premise were correct, it would not justify "deviation from the normal appellate processes." *Fabrizio*, however, involved only the construction of a different, though related, statute (18 U.S.C. 1953) and did not raise the constitutional issue submitted by petitioner (See slip opinion, p. 8). Moreover, the constitutionality of 18 U.S.C. 1084 has several times been sustained. See *Turf Center, Inc.* v. *United States*, 325 F.2d 793 (C.A. 9); *United States* v. *Borgese*, 235 F. Supp. 286 (S.D. N.Y.); *United States* v. *Smith*, 209 F. Supp. 907 (E.D. Ill.). The fact that Nevada has legalized gambling does not render unconsitutional the congressional decision to close the channels of interstate communication to the transmission of wagers and wagering information between that State and States where wagering is not permitted. See *Lottery Case*, 188 U.S. 321, 357-358.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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DECEMBER 1966.

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